Supreme Court, U.S.
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No. 92-1498

In The

Supreme Court of the United States

October Term, 1992

SANDRA G. WILDER,

Petitioner,

v.

WARREN F. EBERHART, M.D. and
THE CONCORD CLINIC, INC.,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

MARTIN L. GROSS
(Counsel of Record)
WILLIAM D. PANDOLPH
SULLOWAY & HOLLIS
9 Capitol Street
Concord, NH 03302-1256
(603) 224-2341
Counsel for the Respondents

April 14, 1993

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should review the Court of Appeals' determination of state law regarding the admission of expert testimony in a diversity action, where the case involves no important question of federal law nor any conflict of opinions among the United States Courts of Appeal.

2. Whether this Court should review the Court of Appeals' denial of petitioner's motion for certification to the New Hampshire Supreme Court, when the motion was first made after the Court of Appeals had determined the question sought to be certified, and where the case involves no important question of federal law nor any conflict of opinions among the United States Courts of Appeal.

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STATEMENT OF THE CASE

This Petition for a Writ of Certiorari arises from the decision of the Court of Appeals for the First Circuit, ruling that the District Court misapplied New Hampshire state law in excluding defendants' expert testimony. The case involved a medical malpractice claim under diversity jurisdiction, governed by New Hampshire law. Petitioner (Ms. Wilder) challenges the decision of the Court of Appeals and further seeks review by this Court of the Court of Appeals' decision to deny her motion for certification of the question to the New Hampshire Supreme Court, made by the petitioner for the first time after the Court of Appeals had determined the question sought to be certified.

In the District Court, Ms. Wilder claimed she had been injured during the course of a surgical procedure performed by the respondent, Dr. Eberhart. The evidence excluded by the District Court involved testimony from defense expert witnesses regarding how Ms. Wilder's injury could have been caused, other than by the alleged negligence of Dr. Eberhart.

The surgical procedure in question was a vertical banded gastroplasty (VBG). A VBG is an operation designed to produce weight loss in morbidly obese individuals. As part of the VBG procedure, an instrument known as a Maloney dilator is orally passed by an anesthesiologist through the esophagus. Near the end of the operation, the Maloney dilator is removed and replaced with a nasogastric tube. This tube is inserted in the patient's nose by the anesthesiologist, and passed through the esophagus into the patient's stomach.

During Ms. Wilder's operation, when the anesthesiologist withdrew the Maloney dilator and inserted the nasogastric tube, Dr. Eberhart observed that the nasogastric tube had passed outside the esophagus into the abdomen rather than into the stomach. This indicated to Dr. Eberhart that there was a tear in plaintiff's esophagus, which he promptly located and repaired.

In her action against Dr. Eberhart and Dr. Eberhart's employer, the Concord Clinic, Inc., Ms. Wilder alleged, among other things, that Dr. Eberhart caused the esophageal tear when mobilizing her esophagus during surgery. (Appendix p. 3). Ms. Wilder's expert witness, Dr. Saul Weinstein (a general surgeon) categorically ruled out any possibility that the Maloney dilator or nasogastric tube could have caused Ms. Wilder's esophageal injury. (Appendix p. 3). Furthermore, Dr. Weinstein concluded "without reservation" that Dr. Eberhart caused plaintiff's esophageal injury when mobilizing her esophagus during the VBG procedure. (Appendix p. 4).

To refute Dr. Weinstein's testimony, defendants were prepared to offer their expert witnesses, Dr. David J. Sugarbaker, Assistant Professor of Surgery at Harvard Medical School and Chief of Thoracic Surgery at Brigham and Women's Hospital in Boston, and Dr. Edward G. Mason, the developer of the VBG technique. (Appendix p. 4).

Dr. Sugarbaker and Dr. Mason were prepared to testify that the precise cause of Ms. Wilder's esophageal injury could not be determined with a reasonable degree of medical probability or certainty. (Appendix pp. 5, 13). The purpose of such testimony was to rebut and discredit

Dr. Weinstein's testimony (1) that Dr. Eberhart caused the injury when mobilizing Ms. Wilder's esophagus during the VBG procedure; and (2) that the Maloney dilator or nasogastric tube could not have caused the injury. As the basis for their opinion, defendants' experts were prepared to testify that there existed a number of possible causes of Ms. Wilder's injury. (Appendix pp. 4, 13, 15).

In this regard, Dr. Sugarbaker and Dr. Mason were prepared to discuss in detail each possibility, and explain to the jury why such possibility was a candidate in Ms. Wilder's case. (Appendix pp. 4, 15). Moreover, notwithstanding their opinion that no one, including Dr. Weinstein, should be able to determine more probably than not the precise cause of Ms. Wilder's esophageal injury, defendants' experts were prepared to testify that instrumentation was a more likely cause of Ms. Wilder's injury than mobilization of the esophagus by Dr. Eberhart. This was to be done by a ranking of the possible causes of Ms. Wilder's esophageal injury in order of likelihood. (Appendix pp. 4, 15). This ranking would reflect that the most likely of the possible causes was the passage and manipulation by the anesthesiologist of certain instruments – the Maloney dilator or Nasogastric tube – through or in the esophagus, and correspondingly, the least likely of the possible causes was mobilization of the esophagus by Dr. Eberhart. (Appendix pp. 4, 15).

However, just moments before defendants' medical experts were to testify (on the fourth day of trial), Ms. Wilder filed a motion *in limine* seeking to exclude any opinion testimony by defendants' experts regarding causation that could not be expressed in terms of probability. (Appendix pp. 4, 12). Ms. Wilder's counsel argued that if

defendants' experts were going to offer opinions about other potential causes of Ms. Wilder's esophageal injury, then the burden of proof shifted to the defendants to prove that another cause, other than mobilization of the esophagus by Dr. Eberhart, was more probably than not the cause of her esophageal tear. (Appendix pp. 4-5, 12). According to Ms. Wilder's counsel, because defendants' experts were unable to say whether any possible cause more probably than not caused Ms. Wilder's esophageal injury, their testimony regarding causation was not permitted under New Hampshire law. (Appendix p. 12).

In response, counsel for the defendants argued that their experts were entitled to offer evidence of other possible causes to support their opinion that no one, including Ms. Wilder's expert, should be able to say more probably than not that Dr. Eberhart caused Ms. Wilder's esophageal tear when mobilizing her esophagus. (Appendix pp. 5, 13). The defense also argued that the burden of proof did not shift to the defense, and further, that defense experts were entitled to testify as to other possible causes of the esophageal injury to rebut and discredit Ms. Wilder's expert testimony that the nasogastric tube or the Maloney dilator could not have caused her esophageal injury. (Appendix pp. 5, 13).

Notwithstanding defense counsel's argument, the District Court granted Ms. Wilder's motion, ruling that under New Hampshire law defense experts could offer testimony regarding causation only if they were able to testify that an alternative cause more probably than not was the cause of Ms. Wilder's esophageal injury. (Appendix pp. 2, 5). In essence, the District Court held that if

defendants' medical experts could not disprove causation, then they could not offer testimony to rebut or discredit Ms. Wilder's expert testimony. Contrary to petitioner's assertion to this Court, (*Petition*, p. 11), the District Court did not preclude defendants' expert testimony because it believed that such testimony would be unduly prejudicial and confusing to the jury, or because there was no other evidence to "bolster or corroborate" their opinions.

The jury subsequently found in Ms. Wilder's favor, in the amount of $685,000. On appeal, the Court of Appeals vacated the judgment and remanded the case for new trial, holding that the trial judge erred in prohibiting defendants' experts from testifying as to other possible causes of Ms. Wilder's esophageal injury to rebut or discredit Dr. Weinstein's causation testimony. (Appendix p. 2). In this regard, petitioner's assertion that the Court of Appeals set aside the verdict because it erroneously concluded, based on defendants' representations, that defendants were prepared to offer expert testimony on the cause of Ms. Wilder's esophageal injury "based on a probability", is simply inaccurate.

REASONS FOR DENYING THE PETITION

A. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE COURT OF APPEALS' DETERMINATION OF STATE LAW REGARDING THE ADMISSABILITY OF EXPERT TESTIMONY INVOLVES NO IMPORTANT QUESTION OF FEDERAL LAW NOR ANY CONFLICT OF OPINIONS AMONG THE UNITED STATES COURTS OF APPEAL.

A federal court of appeals must review *de novo* a federal district court's determination of state law. *Salve Regina College v. Russell*, 499 U.S. ___, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991). This is based on the recognition that in the course of presiding over a fast-paced trial, district judges must often resolve questions of law without the benefit of extended reflection or extensive information. 499 U.S. at ___, 113 L. Ed. 2d at 198.

In contrast, federal courts of appeal are structurally suited to the collaborative judicial process that promotes decisional accuracy. They are able to devote their primary attention to legal issues. They have the advantage of refined briefs which bring to bear on the legal issues more information and more comprehensive analysis than was provided to the district judge. Perhaps most importantly, they employ multi-judge panels that permit reflective dialogue and collective judgment. *Id.*

Accordingly, when determining whether it should choose to expend its limited resources in the exercise of discretionary jurisdiction, this Court has traditionally accepted or deferred to the interpretation of state law made by a court of appeals. *See, e.g., Brockett v. Spokane*

Arcades, Inc., 472 U.S. 491, 499-500 (1985); *Propper v. Clark*, 337 U.S. 472, 486-487 (1948). This is true even if an examination of the state law issue without such guidance might have justified a different conclusion. *Bishop v. Wood*, 426 U.S. 341, 346 (1976). This also reflects the Court's belief that the courts of appeal are better schooled in and more able to interpret the laws of their respective States.[1] *See, e.g., Propper*, 337 U.S. at 486-487.

In the present case, the Court of Appeals, based on a well-reasoned interpretation of existing New Hampshire law, held that defense experts were entitled to offer opinions on other possible causes of Ms. Wilder's injury to rebut or discredit her causation evidence. (Appendix p. 7). In respondents' view, this question presented neither a close, novel nor unsettled issue of New Hampshire law.

Specifically, as the Court of Appeals correctly recognized, under New Hampshire law the burden of proving causation in a medical malpractice case rests and remains with the plaintiff. (Appendix p. 6). *Pillsbury-Flood v. Portsmouth Hospital*, 128 N.H. 299, 304, 512 A.2d 1126, 1129 (1986). Moreover, New Hampshire law requires that causation in a medical malpractice case be established by expert testimony. (Appendix p. 6). *Martin v. Wentworth-Douglass Hospital*, 130 N.H. 134, 136, 536 A.2d 174, 176 (1987). Accordingly, in the present case, Ms. Wilder had

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[1] In this regard, Judge Norman H. Stahl, a member of the Court of Appeals panel, had served as a District Judge in New Hampshire before his appointment to the Court of Appeals. Before his appointment to the District Court, Judge Stahl had practiced law in New Hampshire.

the burden to prove, through expert testimony, that Dr. Eberhart caused her esophageal injury.

Because the burden of proof of causation rests and remains with the plaintiff, a plaintiff's expert testimony is admissible only if the expert witness is able to state his or her opinions with a reasonable degree of medical probability or certainty. *See, e.g., Emerson v. Company*, 87 N.H. 108, 112, 174 A. 779 (1934).

On the other hand, defendants need not disprove causation. (Appendix p. 7). *Pillsbury-Flood*, 128 N.H. at 304. Rather, defendants' task is merely to produce credible evidence to rebut or discredit a plaintiff's evidence that their alleged negligence was the cause of the plaintiff's injury. (Appendix p. 7). *Tzimas v. Coiffures By Michael*, 135 N.H. 499, 501, 606 A.2d 1082, 1084 (1992).

Based upon its review of these New Hampshire authorities, the Court of Appeals correctly held that defendants' experts were entitled to testify as to other possible causes of Ms. Wilder's injury to rebut or discredit her evidence regarding causation. (Appendix pp. 7-8). This is because, among other things, such testimony is not being offered as proof of a specific fact, but simply to block the effect of opposing evidence. As recognized by the Court of Appeals, prohibiting defendants' experts from testifying about other causes unless they were able to say that such other cause more probably than not was responsible for Ms. Wilder's injury would, in effect, shift the burden of proof to the defendants to *disprove* causation. (Appendix p. 7).

As recognized by the Court of Appeals as well as the New Hampshire Supreme Court, the cases cited by Ms.

Wilder and the trial court, *e.g., Emerson v. Company*, 87 N.H. 108, 174 A. 779 (1934), stand for other principles inapplicable to the facts of this case. (Appendix p. 6). *Bartlett Tree Experts Co. v. Johnson*, 129 N.H. 703, 706-707, 532 A.2d. 1373 (1987). At most, these cases prescribe the level of certainty that expert testimony must meet when offered by a party seeking to establish a fact necessary for recovery. They do not govern whether a defendant in a medical malpractice action may offer "possibility" evidence to rebut or discredit a plaintiff's "probability or certainty" evidence. (Appendix p. 6).

In the present case, because the District Court erroneously granted Ms. Wilder's motion *in limine*, defendants' experts were not allowed to testify fully and fairly to rebut or discredit Ms. Wilder's expert testimony. The Court of Appeals' correction of the District Court's error does not present any issue justifying consideration by this Court.

B. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE COURT OF APPEALS' DENIAL OF PETITIONER'S MOTION FOR CERTIFICATION INVOLVES NO IMPORTANT QUESTION OF FEDERAL LAW NOR ANY CONFLICT OF OPINIONS AMONG THE UNITED STATES COURTS OF APPEAL.

As noted, after the Court of Appeals rendered its decision, the petitioner for the first time requested that the issue be certified to the New Hampshire Supreme Court, pursuant to New Hampshire Supreme Court Rule 34. The Court of Appeals denied the request and the

petitioner now seeks review of that denial. Again, this presents no question that would warrant certiorari.

The decision whether to certify a state law issue to the state's highest court in a given case rests in the sound discretion of the federal court. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Even in the absence of a definitive ruling by the highest state court, it is inappropriate to use certification when the course state courts would take is reasonably clear. *Bi-Rite Enterprises, Inc. v. Bruce Miner Co. Inc.*, 757 F.2d 440, 443 n. 3 (1st Cir. 1985). In this regard, a federal court may consider analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue. *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988).

In the present case, the Court of Appeals, based on a well-reasoned interpretation of existing New Hampshire law, held that defendants should have been permitted to offer evidence of other possible causes of Ms. Wilder's injury to rebut or discredit her causation evidence. As previously noted, in respondents' view, this question presented neither a close, novel nor unsettled issue of New Hampshire law. Accordingly, certification was inappropriate.

Moreover, one who chooses to litigate a state law claim in federal court must generally accept the federal court's interpretation of state law. *Croteau v. Olin Corp.*, 884 F.2d 45, 46 (1st. Cir. 1989). This is particularly true where certification is sought by a party after it has failed to persuade the federal court. *See Fisher*, 857 F.2d at 8.

In addition, in the present case it was only after the Court of Appeals had vacated the judgment and remanded the case that petitioner sought certification to the New Hampshire Supreme Court of the very question resolved by the Court of Appeals. (Appendix p. 9). As correctly noted by the Court of Appeals, such request amounted to an appeal of its decision to the New Hampshire Supreme Court through the certification process. (Appendix p. 9).

In such circumstance, it was well within the discretion of the Court of Appeals to avoid duplicating judicial effort by denying petitioner's motion for certification, either while the case was before it or following remand to the District Court. Such a ruling presents no issue justifying consideration by this Court.

CONCLUSION

For the reasons stated, the respondents, Dr. Warren F. Eberhart and Concord Clinic, Inc., respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

MARTIN L. GROSS
(Counsel of Record)
WILLIAM D. PANDOLPH
SULLOWAY & HOLLIS
9 Capitol Street
Concord, NH 03302-1256
(603) 224-2341
Counsel for the Respondents

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-1274

SANDRA G. WILDER,

Plaintiff, Appellee,

v.

WARREN F. EBERHART, M.D., AND
CONCORD CLINIC, INC.,

Defendants, Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Martin F. Loughlin, *Senior U.S. District Judge*]

Before

Torruella and Stahl, *Circuit Judges*,
and Hornby, **District Judge*.

Robert M. Larsen, with whom *William D. Pandolph* and *Sulloway Hollis & Soden*, were on brief for appellants.

John Pierce Kalled, with whom *Douglas P. Hendrickx* and *Kalled Law Offices*, were on brief for appellee.

October 8, 1992

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* Of the District of Maine, sitting by designation.

TORRUELLA, *Circuit Judge*. Doctor Warren F. Eberhart, ("Dr. Eberhart") appeals an adverse judgment rendered in this medical malpractice action, stemming from a suit filed by his former patient Sandra Wilder ("Ms. Wilder"). On appeal, Dr. Eberhart raises the issue of whether the district court committed reversible error in excluding and/or limiting rebuttal expert testimony to that which could be expressed quantifiably in terms of "probability." Because we agree with Dr. Eberhart, that the district court erred in limiting his defense expert's testimony, we vacate the judgment and remand for a new trial.

BACKGROUND

On May 21, 1985, Ms. Wilder, a Vermont resident, saw Dr. Eberhart in his Concord New Hampshire office for consultation regarding Ms. Wilder's obesity and the medical options available to control her weight problem. Following the consultation, Dr. Eberhart determined that Ms. Wilder was a candidate for a vertical banded gastroplasty ("VBG") or vertical stapling of the stomach. Ms. Wilder was admitted to the Concord Hospital on June 11, 1985, under the care of Dr. Eberhart. The following day, June 12, 1985, Dr. Eberhart performed the VBG on Ms. Wilder. The procedure went uneventfully until near the end when Dr. Eberhart noticed a 3 to 3.5 centimeter tear in Ms. Wilder's lower esophagus. The tear was repaired by suturing the tear and then suturing a fold of the gastric tissue around the tear site for additional support – a procedure known as a Nissen fundoplication. Following the operation, Ms. Wilder was sent to the recovery room.

On the following day, June 13, 1985, Dr. Eberhart determined that there was still leakage at the lower esophagus. He operated again that same day and discovered two tears in Ms. Wilder's lower esophagus. The tears were repaired. On June 20, 1985, Dr. Eberhart decided to operate again when an X-ray revealed that the lower esophagus and upper stomach were not healing properly. During the operation, it was discovered that the lower esophagus and upper stomach were no longer viable. Thus Dr. Eberhart removed that dead tissue and sewed the upper side of the stomach closed. The remainder of the stomach was reconnected to the esophagus. Eventually, Ms. Wilder was transferred to the Dartmouth-Hitchcock Medical Center, were she remained hospitalized for 101 days until her release in November of 1985.

Ms. Wilder filed this diversity suit in the United States District Court for the District of New Hampshire against Dr. Eberhart and the Concord Clinic alleging amongst other things negligence on behalf of Dr. Eberhart in mobilizing the esophagus during surgery, causing her recurring esophageal injury. A jury awarded Ms. Wilder $685,000 in damages.

The Trial

I. Expert Testimony

Dr. Saul Frank Weinstein ("Dr. Weinstein"), a general surgeon from Philadelphia, testified via video deposition as plaintiff's expert. Dr. Weinstein categorically ruled out any possibility that instrumentation could have cause the injury to Ms. Wilder's esophagus. Further, he concluded

without reservation that the sole cause of the esophageal injury was mobilization of the esophagus by Dr. Eberhart during the VBG procedure.

On the fourth day of trial, three days after the video deposition of Dr. Weinstein was presented, the defendants were prepared to introduce their expert witnesses, Dr. David J. Sugarbaker ("Dr. Sugarbaker"), Assistant Professor of Surgery at Harvard Medical School and Chief of Thoracic Surgery at Brigham and Women's Hospital, and Dr. Edward Mason ("Dr. Mason"), the developer of the VBG technique. Both were prepared to testify that other "possible" causes of the esophageal injury[1] existed. Just moments before Dr. Sugarbaker's testimony, Ms. Wilder's counsel filed a Second Motion in Limine seeking to exclude any opinion testimony by defendants' experts that could not be expressed in terms of "probability" as distinguished from "mere possibility."

Ms. Wilder's counsel argued that by presenting evidence of particular possible causes of the injury, defendant was raising an affirmative defense which shifted the burden to Dr. Eberhart to prove that another cause, other than manipulation of the esophagus during surgery, was

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[1] Defendants' experts were to testify as to each possible cause of Ms. Wilder's esophageal tear. Moreover, the experts were going to rank the possibilities in order of likelihood, reflecting the most likely causes. Out of this ranking, the defendants' experts would conclude that the most likely cause of Ms. Wilder's injury was the passage and manipulation by the anesthesiologist of certain instruments – the Nasogastrict tube or the Maloney dilator – through or in the esophagus, and correspondingly, that the least likely of the possible causes was mobilization of the esophagus by Dr. Eberhart.

more probably than not the cause of the tears to the esophagus. Defense counsel argued that it was entitled to put on testimonial evidence to the effect that no one, including Ms. Wilder's expert, Dr. Weinstein, should be able to say more probably than not the cause of the tears to the esophagus was manipulation or mobilization of the esophagus. Defense counsel also argued that the burden of proof regarding causation did not shift to the defense, and further, that defense experts were entitled to testify as to other possible causes of the esophagus tears in rebuttal of the claims made by the plaintiff's witnesses.

STANDARD OF REVIEW

Generally, the decision whether or not to admit expert testimony is a matter within the sound discretion of the trial judge. *Int'l Adhesive Coating Co., Inc. v. Bolton Emerson Int'l*, 851 F.2d 540, 544 (1st Cir. 1988) (citing *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190, 1196-97 (1st Cir. 1987)); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 703[l], at 703-04 (1987)). The trial judge's decisions will not be disturbed absent a clear abuse of that discretion or an error of law. *Id.* (citing *DaSilva v. American Brands, Inc.*, 845 F.2d 356, 361 (1st Cir. 1988)). We find that the trial judge committed clear error in prohibiting defendant's experts from testifying as to other possible causes in rebuttal of Dr. Weinstein's testimony, and thus we vacate and remand the case for a new trial.

DISCUSSION

Plaintiff's Second Motion in Limine cited *Emerson v. Twin State Gas and Electric Co.*, 174 A. 779 (N.H. 1934), for

the proposition that "the opinion testimony of a physician is admissible if stated within reasonable medical probability." In granting plaintiff's Second Motion in Limine to limit the testimony of Drs. Sugarbaker and Mason, the trial judge agreed with the defendants that the burden of proof did not shift, yet he cited *Bentley v. Adams,* 128 A.2d 202 (N.H. 1956) and *Brann v. Exeter Clinic, Inc.,* 498 A.2d 334 (N.H. 1985), concluding that to admit testimony of possibilities would result in "reversible error." (Tr. Vol. 4 p. 52). This effectively shifted the burden somewhat to the defendant, because he now had to prove more probably than not, that another cause, not manipulation, was the cause of Ms. Wilder's injury. Besides finding that these cases stand for other principles inapplicable to the facts presented by this case,[2] our review of applicable case law leads us to but one conclusion; that the trial court committed a clear error of law in excluding defendants' expert rebuttal testimony.

It is well settled under New Hampshire law that the burden of proof with respect to causation in a medical malpractice case rests and remains with the plaintiff. *Pillsbury-Flood v. Portsmouth Hospital,* 512 A.2d 1126, 1129 (N.H. 1986). Moreover, proximate causation between negligence and the injury complained of in a medical malpractice case must be established by expert testimony. *Martin v. Wentworth-Douglass Hospital,* 536 A.2d 174, 176

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[2] These cases generally refer to the plaintiff's burden of proof; that the plaintiff must prove his case within a reasonable degree of medical certainty. They are silent as to whether or not a defendant in a medical malpractice action or any negligence action may present "possibility" evidence when rebutting plaintiff's "probability or certainty" evidence.

(N.H. 1987). On the other hand, the defendant need not disprove causation. Rather, he must produce credible evidence which tends to discredit or rebut the plaintiff's evidence. *Tzimas v. Coiffures By Michael,* 606 A.2d 1082, 1084 (N.H. 1992). As the New Hampshire Supreme Court recently stated in *Tzimas,* the plaintiff in a negligence action bears the burden of producing evidence "to prove that it is more likely than not that [plaintiff's] injury was" caused by the defendant's negligence. *Tzimas,* 606 A.2d at 1084. Defendant need not prove another cause, he only has to convince the trier of fact that the alleged negligence was not the legal cause of the injury. *Id.* In proving such a case, a defendant may produce other "possible" causes of the plaintiff's injury. These other possible causes need not be proved with certainty or more probably than not. To fashion such a rule would unduly tie a defendant's hands in rebutting a plaintiff's case, where as here, plaintiff's expert testifies that no other cause could have caused plaintiff's injury. The burden would then shift and defendant would then bear the burden of positively proving that another specific cause, not the negligence established by plaintiff's expert, caused the injury. Certainly, this is much more than what should be required of a defendant in rebutting a plaintiff's evidence.

Were we to accept plaintiff's argument that once a plaintiff puts on a prima facie case, a defendant cannot rebut it without proving another cause, the resulting inequities would abound. For example if ninety-nine out of one hundred medical experts agreed that there were four equally possible causes of a certain injury, A, B, C

and D, and plaintiff produces the one expert who conclusively states that A was the certain cause of his injury, defendant would be precluded from presenting the testimony of any of the other ninety-nine experts, unless they would testify conclusively that B, C, or D was the cause of injury. Even if all of defendant's experts were prepared to testify that any of the possible causes A, B, C or D, could have equally caused plaintiff's injury, so long as none would be prepared to state that one particular cause, other than that professed by plaintiff more probably than not caused plaintiff's injury, then defendant's experts would not be able to testify at all as to causation. We think that such a result does not reflect the state of the law in New Hampshire, and furthermore would be manifestly unjust and unduly burdensome on defendants.

Under the circumstances of this case, Dr. Eberhart was prejudiced by the granting of the Second Motion in Limine, and this prejudice constituted reversible error. Thus, the judgment in favor of plaintiff is vacated and remanded for a new trial.

Vacated and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 92-1274

SANDRA G. WILDER,

Plaintiff, Appellee,

v.

WARREN F. EBERHART, M.D., AND CONCORD CLINIC, INC.,
Defendants, Appellants.

Before

Torruella and Stahl, *Circuit Judges*,
and Hornby, *District Judge*.

ORDER OF COURT

Entered December 17, 1992

Appellee's motion for certification of questions to the New Hampshire Supreme Court is denied.

Appellee never requested certification from the district court. It is now too late. Now that she received an unfavorable decision, she wants another day in court. We are under no obligation to provide appellee with what would amount to an appeal of our decision to the New Hampshire Supreme Court. *See Croteau v. Olin Corp.*, 884 F.2d 45, 46 (1st Cir. 1989). Certification is no longer the appropriate course either before us or on remand to the district court.

In the present case, the defendant desired to produce evidence that there were other causes for the injury that were more likely than the cause that the plaintiff offered. He did not request judgment as a matter of law. He simply wanted the jury to hear all of the evidence, as is their job. The evidence was fully admissible, at the very least, on a credibility basis because plaintiff's expert had said that there was only one probable cause for this injury and he excluded all others. Under those circumstances, the jury was entitled to hear from the expert who devised the operation, that other causes did exist which were equally as probable as that postulated by the plaintiff's expert even though on a probability basis the expert could not say which cause was the more probable.

Motion denied.

By the Court:
Francis P. Scigliano
Clerk.

[cc: Messrs. Larsen and Kalled]

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 92-1274

SANDRA G. WILDER
Plaintiff, Appellee,

v.

WARREN F. EBERHART, M.D.
CONCORD CLINIC, INC.
Defendants, Appellants

ORDER OF COURT

Before

Breyer, *Chief Judge,*
Torruella, Selya, Cyr,
Boudin, Stahl, *Circuit Judges,*
and Hornby*, *District Judge.*

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the Judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Clerk.

[cc: Messrs. Larsen and Kalled]

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* of the District of Maine, sitting by designation.

APPENDIX D

Hearing on Plaintiff's Second Motion in Limine

MR KALLED: I just object, your Honor, to the defendants putting in any evidence, opinion evidence by the physicians about causation or standard of care that is not supported by an opinion of probability, reasonable medical probability. The defendant is certainly permitted to have his witnesses discuss in a general medical sense what the field of medicine and surgical risks are in a given surgical theater. However, with respect to the particular events and the particular medicine that applies to this client, if they offer opinions about what caused the problem or who caused the problem they have then gone into a new territory. They have then gone into an affirmative defense defending against the plaintiff's claims of malpractice by offering an argument of alternative causation, and when they do that the burden of proof shifts to the defendant.

THE COURT: All right. One, that's the beauty of cross-examination, and you're going to have that opportunity. Two, Brother Larsen did not get into anything pertaining to the Maloney dilator as being causation or the Penrose drain, and of course he's going to have something more to say on that. And three, and I'm not being critical, but this should be a lesson to you. The next time you have a malpractice case on this join everybody. The anesthetist, the whole works. But I'm not going to let him blame the anesthetist. And, Bob, I have some case law.

MR. LARSEN: If I can just state my position the plaintiff's Second Motion in Limine. I want to make an offer of proof to the Court first, it is our experts' opinion in this case that no one can precisely determine the cause of this perforation of the esophagus, meaning that they do not believe that anyone, including Dr. Weinstein, should be able to say that more probably than not the cause was manipulation or mobilization of the esophagus.

I believe it to be relevant and probative for our experts to challenge Dr. Weinstein's opinions in this regard. I think our experts can do that one of two ways: by saying they disagree with him, that no one knows for sure, and that there are numerous possibilities as to what the cause could be. And indeed, Dr. Sugarbaker, although he was not asked directly, he indicated that instrumentation is one of the potential causes. And she may have been predisposed for that here. We are into this issue in this case.

The issue of possible cause is central to my defense of this case. It is not my burden to prove more probably than not that the cause was one thing or another. My Brother confuses his burden with my obligation under the rules to offer evidence which is relevant and probative. There is no burden shifting under New Hampshire Law. There are cases on that. The burden in a medical malpractice case never shifts to the defendant at any time. I am not about to prove in this case more probably than not that the cause was one thing or another. I simply want to introduce evidence which raises questions about possible causes. I believe that to be relevant. I believe it to

be probative, and I believe that I should be able to get into it.

And as I indicated, your Honor, I think we're already into this. He interjected the issue of other ways of causing injury to the esophagus when he went after my client with this article, the Sabiston article, which has a table in it, your Honor, which lists the possible causes of esophageal perforation. So I think it's important to our case, I think we're into it, and I think finally that the motion, Motion in Limine is not based on a correct reading of New Hampshire law.

THE COURT: Well, I'm going to stick by my off-the-record comments, but at the time I did not have the case law at hand. And the case, I think the leading case on this is *Bentley vs. Adams.* I think it was Judge Grant who got reversed on that one. 100 N.H. 377.

There's another case more recent, *Brann vs. Exeter Clinic,* 127 N.H.155.

And what I think maybe we're misconstruing, not you, but I think we may be misconstruing, Bob, that *Pillsbury-Flood vs. Portsmouth Hospital* case in 128 N.H. 299 in which our Supreme Court rejected the *Hicks* case saying the burden of proof has to shift to the defendant. I'm not saying the burden of proof has shifted.

MR. LARSEN: I know you're not, your Honor. I understood him to say as an additional argument that the burden of proof shifts.

THE COURT: I think he's misconstruing that case.

MR. LARSEN: But if I can't attack Saul Weinstein on this point it's essentially to put a kerchief around my

mouth, because I can't offer evidence. My doctors will say that among the possibilities –

THE COURT: When you say your doctors, you mean Dr. Mason and Dr. Sugarbaker?

MR. LARSEN: Yes, will say that among the possibilities, and they've already gotten into this, that the cause of this perforation is instrumentation. And, indeed, among the possibilities they believe that instrumentation is the most likely possibility. They cannot say that that is for certain the cause. And why is that so?

THE COURT: Can I interrupt for a minute, please? Instrumentation. Are you saying the anesthetist or the defendant?

MR. LARSEN: You know, I'm going to address that. I am not blaming the anesthetist in this case, I didn't open that way and I'm not trying that. Indeed, your Honor, my own client doesn't blame them. He says he doesn't think it was the Maloney dilator. You know, we've been into possibilities in this case already. He was asked the question. He said what do you think the cause was. He said, well, there are some possibilities.

MR. KALLED: It was in deposition.

MR. LARSEN: You asked this question in the courtroom. There are possibilities, including the Maloney dilator and the NG tube. But he said I don't think those are the likely causes. Well, I've got two experts in this courtroom who believe that the Maloney dilator was probably the cause of that perforation.

MR. KALLED: No, they don't believe probably.

THE COURT: No, they don't, and that's the magic word unfortunately. It might seem ludicrous, but that's the word.

MR. LARSEN: I misspoke, I mean among the possibilities. And I can't put it any more succinctly than that.

THE COURT: No, I think you have.

MR. LARSEN: I think I am being held to the standard of burden of proof which is not mine. There's no question in New Hampshire that the burden of proof is on the plaintiff not with respect to standard of care, but only with respect to causation, John. Your burden is to prove more probably than not the cause.

MR. KALLED: I accept that burden, but when you offer alternative causation theories, then you've gone beyond simply opening the door . . .

THE COURT: John, if I let that in, Bob, possibilities, the distinction with the jury, it's a matter of semantics and it's a penumbra and it's a fine line. If I let that in they're damn well going to find, may find for the defendant and you're going to get reversible error, and I don't want to try this thing again.

MR. LARSEN: Would you agree with me that at least the experts can talk about the possible causes of injury, but not to assign . . . I mean I think what you're, the point where you're hung up is arguing that among the possibilities that some are more likely than others.

THE COURT: If they say that, that's the magic word.

MR. LARSEN: Okay.

MR. KALLED: What's that?

THE COURT: If they say more likely than otherwise or more possible, that's the magic word. I didn't make these rules and I'm not going to blow this case.

MR. KALLED: Right. But they can't say more probable among a bunch of possibles. That's piggybacking.

MR. LARSEN: I'm not going to ask them that. I just did this with Sugarbaker. No one objected.

MR. KALLED: You didn't do that.

MR. LARSEN: I said what are the possible causes of injury to the esophagus and he listed them.

MR. KALLED: That's general.

THE COURT: That's general.

MR. KALLED: That's not to my client.

THE COURT: Look, let me put it succinctly. I like that word too. You get into probabilities, it's admissible. You get into possibilities, it's inadmissible. I think your record is complete.

APPENDIX E

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Sandra Wilder

v. #C-89-091-L

Warren F. Eberhart, M.D. and
Concord Clinic

ORDER

The instant action involves a medical malpractice suit against defendant, a New Hampshire surgeon. On May 21, 1985, the plaintiff saw defendant at his office at the Concord Clinic. At the time of the office visit, plaintiff was severely overweight and desired surgery to control her obesity. Defendant concluded she was a candidate for gastric surgery.

Plaintiff was admitted to the Concord Hospital on June 11, 1985 under the care of defendant. On June 12, 1985, defendant performed a vertical banded gastroplasty, or vertical stapling of the stomach. During this procedure, a hole was discovered in plaintiff's esophagus and was repaired.

Subsequently, it was determined that the tears in the esophagus had reopened and plaintiff was returned to the operating room on June 13, 1985 for an esophagoplasty. On June 20, 1985, plaintiff became diaphoretic, weak and complained severely of upper abdominal pain. Upon examination, bright red blood was noted in the NG tube and at the penrose drain sites. A Gastrografin swallow showed leakage at the esophageal junction. The

patient was returned to the operating room on June 20, 1985 for an esophagogastroscopy.

On June 25, 1985, plaintiff was transferred from the Concord Hospital to the Dartmouth Hitchcock Hospital, where she remained until October 3, 1985.

On February 28, 1989, plaintiff commenced an action in this court alleging, in various counts, substandard care on the part of defendant. A trial before this court commenced on December 4, 1991. On December 12, 1991, the jury returned a general verdict against the defendants awarding plaintiff damages in the amount of $685,000.00.

Pending before the court are defendants' renewed motion for judgment as a matter of law, motion for a new trial, and motion for remittitur.

Discussion

Defendants move for a new trial, pursuant to Rule 59, Fed. R. Civ. P., and ask for judgment as a matter of law, in accordance with the provisions of Rule 50, Fed. R. Civ. P. Defendants object to the jury verdict entered December 12, 1991, awarding $685,000.00 in damages to plaintiff. Defendants claim there were errors of law made at the trial in the form of admissions and exclusions of evidence; the verdict was excessive; and there were omissions in the charge to the jury. Defendants also claim there was insufficient evidence to support the jury's finding that defendants were negligent and urge this court to grant their motion for judgment as a matter of law.

Whether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be

determined by the court. *Roche v. New Hampshire National Bank*, 192 F.2d 203 (1st Cir. 1951); 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2524 (1971). "Since grant of [judgment as a matter of law] deprives the party of a determination of the facts by a jury, they should be cautiously and sparingly granted." *Id.*

The principles governing the consideration of a motion for judgment as a matter of law are well settled in the First Circuit: "[t]he evidence must be viewed in the light most favorable to plaintiff, giving [plaintiff] the benefit of every favorable inference that may be fairly drawn. If fair minded [people] may draw different inferences and reasonably disagree as to what the verdict should be, the matter is for the jury." *Valedon Martinez v. Hospital Presbiteriano*, 806 F.2d 1128, 1134 (1st Cir. 1986) (citations omitted). "The rule in this circuit remains that a scintilla of evidence is insufficient." *Magnat Corp. v. B & B Electroplating Co.*, 358 F.2d 794, 797 (1st Cir. 1966). Defendants have failed to meet the standard which would compel us to grant judgment as a matter of law under Rule 50. Viewing the evidence in the light most favorable to plaintiff, this court finds that plaintiff presented sufficient evidence to support the jury's finding that the defendants were negligent.

Defendants contend there was insufficient evidence to support the jury's finding of negligence and this court should, therefore, grant their motion for a new trial. In ruling on a motion for a new trial, the court may weigh the evidence before it. *Insurance Co. of North America v. Musa*, 785 F.2d 370, 375 (1st Cir. 1986). Although the granting or denial of the motion lies almost exclusively within the discretion of the trial judge, the exercise of that

discretion is limited by respect for the jury: "a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury . . . " 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2806 (1973). Additionally, "[c]ourts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." *Id.*, §2803. Defendants have failed to meet the burden which would compel us to grant a new trial under Rule 59, since they have shown no harmful or prejudicial error.

Defendants allege that plaintiff did not present any expert testimony regarding causation. The general rule in New Hampshire is that proximate causation between negligence and injury in a medical malpractice case must be established by expert testimony. *Martin v. Wentworth-Douglass Hospital*, 130 N.H. 134, 136 (1987). Plaintiff relied on the testimony of Dr. Saul F. Weinstein to establish causation. Dr. Weinstein testified that the initial 3.5 centimeter tear in plaintiff's esophagus, as well as the resulting loss of the lower end of her esophagus and the upper part of her stomach, were caused within a reasonable medical probability by the substandard medical practice of Dr. Eberhart. Plaintiff's witness Dr. Crichlow testified that he treated plaintiff for problems which had resulted from her three surgeries by Dr. Eberhart.

Defendants contend that the court erred in failing to give requested jury instructions regarding vicarious liability, intervening cause, "unfortunate results", and

"mere error." Defendants' proposed instructions regarding "unfortunate results" and "mere error" were substantially similar to the following instruction which this court gave: "[a] physician is not legally liable for decisions based on his clinical judgment which might not be shown to have been wrong unless those decisions were made without reasonable skill or diligence. Medicine is not an exact science. Doctors and hospitals do not guarantee a perfect result because they undertake to treat a patient."

Defendants' proposed instructions regarding vicarious liability and intervening cause were not erroneously omitted from the charge. Plaintiff's second motion in limine was granted precisely because it sought to exclude testimony improper under New Hampshire law regarding causation and standard of care. "Causation is a matter of probability, not possibility." *Pillsbury-Flood v. Portsmouth Hospital*, 128 N.H. 299, 305 (1986) (citation omitted).

In New Hampshire, the opinion testimony of a physician is admissible if stated within reasonable medical probability. *Emerson v. Twin State Gas & Electric Co.*, 87 N.H. 108, 112 (1934). Testimony regarding mere possibilities is inadmissible. *Id.* Therefore, it was proper for the court to order that the defendants' expert witnesses, Drs. Mason and Sugarbaker, were not permitted to give opinions regarding causation or standard of care unless those opinions were stated within a reasonable medical probability.

In a medical malpractice action, "proof" does not mean demonstration to an absolute certainty. *Boucher v. Larochelle*, 74 N.H. 433, 434 (1908). The plaintiff "was

required only to make it more probable than otherwise that the fact was as he claimed it. The rule . . . that the jury cannot be permitted to determine by guess or conjecture between two equally probable causes of an injury, for one only of which the defendant is responsible, has no application unless the existence of a sufficient cause or causes for the injury, aside from the negligence charged, is conceded or conclusively proved." *Boucher*, 74 N.H. at 434 (citation omitted). Reviewing the record, the court is satisfied that plaintiff did provide sufficient evidence on the proffered probable cause of the injury, namely defendant physician's negligence, so that a reasonable jury could find for plaintiff.

The defendants contend that the verdict is excessive in that it includes elements of damages not properly before the jury. Testimony at trial by plaintiff and supporting medical witnesses presented substantial and convincing evidence that plaintiff suffered the injuries claimed, that the injuries were caused by defendants' negligence, and that plaintiff has suffered as a result of such negligence. If this court determines that the verdict is excessive, it can order a new trial or a new trial on the issue of damages alone. *Kassel v. Gannett Co. Inc.*, 875 F.2d 935, 953 (1st Cir. 1989) (citations omitted).

In New Hampshire, it is assumed that pain and suffering is a very material element of damages in tort cases. *Duguay v. Gelinas*, 104 N.H. 182, 185 (1962). There is no exact or mathematical rule by which such damages can be determined. *Id.* (citation omitted). "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no

standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. Rules devised for measuring pecuniary losses do not fit here." *Id.* (citation omitted). Therefore, it was within the jury's discretion to award the plaintiff an amount which they considered reasonable.

The First Circuit has stated that "[a] verdict should stand unless it is 'grossly excessive,' 'inordinate,' 'shocking to the conscience of the court,' or 'so high that it would be a denial of justice to permit it to stand.' " *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 80-81 (1st Cir.1984) (citations omitted). Upon examination of the trial record and the applicable law, this court finds that the weight of the evidence supported the jury's verdict, and that the amount awarded to the plaintiff was not so excessive as to shock the conscience of the court.

Conclusion

The New Hampshire law regarding medical malpractice actions supports plaintiff's contentions that defendants are liable in damages for injuries to which defendants' negligence contributed. Sufficient causation between negligence and injury has been shown, and the fact that the injury might reasonably be attributable to factors other than the defendants's negligence is not a bar to a verdict for the plaintiff. The contentions regarding the improper admission of rejection of testimony at trial have been discussed, *supra*. The verdict was not so excessive as to be against the weight of the evidence, nor shocking to the conscience of the court, nor clearly revealing errors of law.

Therefore, the defendants' motions are denied, and the jury's verdict will stand.

Martin F. Loughlin
Senior Judge

(February 11, 1992)
February 13, 1992

John P. Kalled, Esq.
Robert M. Larsen, Esq.

APPENDIX F

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Sandra G. Wilder

v. #C-89-091-L

Warren F. Eberhart, M.D.
and Concord Clinic

ORDER OF RECUSAL

The court after much soul searching and deliberation recuses himself from any further participation in this case for the following reasons.

Since the decision setting aside the verdict on October 8, 1992 and remanding the case for a new trial other events have transpired and without vaticinating may question my objectivity or lack of objectivity in this case from defendants' perspective.

At a panel discussion held at the annual First Circuit Conference in Puerto Rico in November, a topic for discussion was "What is Wrong With The First Circuit Court of Appeals?" The tenor of the topic of course I had assumed would be constructive in nature. In retrospect perhaps I had the effrontery and temerity to discuss this case because I believed and still believe that it is a wrong interpretation of New Hampshire law and will have dire consequences. For this I apologize. Apparently there was a misunderstanding between myself and Judges Torruella and Stahl, as I understood that on a remand I could transfer the case to the New Hampshire Supreme Court. This avenue was foreclosed by the First Circuit by order entered on December 17, 1992 and I quote. "Certification

is no longer the appropriate course either before us *or on remand to the district court.*" This was the quietus. The order unequivocally means that the case will have to be retried. A transfer to the New Hampshire Supreme Court had the distinct possibility of reinstating the jury verdict thus obviating a retrial. See *Coffran v. Mary Hitchcock*, 683 F.2d 5 (1st Cir. 1982) regarding wasting of judicial time. Secondly, and perhaps more importantly the issue involved is stare decisis as far as the Federal Court is concerned and of course will have an impact upon New Hampshire State Court practices.

Also in the order of December 17, 1992 is the following and I quote, "In the present case, the defendant desired to produce evidence that there were other causes for the injury that were *more likely* than the cause that the plaintiff offered." There is nothing in the trial record by offer of proof or otherwise that any of the defendants' four doctors would have testified that their testimony was in the aegis of likelihood. If there had been such offer of proof this court is conversant enough with the language in *Brann v. Exeter Clinic*, 127 N.H. 155, 159 (1985) that any or all of defendants' doctors would have been permitted to testify as to likelihood. Another assertion is that the evidence was fully admissible, at the very least, on the issue of credibility. The Court does not believe that defendants' counsel ever elicited credibility as an issue for admissibility. Objections not proffered at the trial court level are not grounds for appellate appeal. *G. D. v. Westmoreland*, 930 F.2d 942, 950 (1st Cir. 1991).

To recapitulate Mrs. Wilder was seriously injured, is practically indigent, will be faced with the costs of a new trial and will also once again encounter four renown

experts in the field of vertical banded gastroplasty, without being ludicrous or mordant, seemingly could testify that possibly a minor earthquake barely perceptible on the Richter scale caused the tear in her lower esophagus while she was in the operation room.

Lip service was not adhered to the law as set forth in *Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir. 1989) and quoting "Customary appellate deference is accorded to interpretations of state law made by federal judges of that state." This judge in addition to thirteen years, nine months on this court served approximately sixteen years on the New Hampshire Superior Court and while Chief Justice resigned to become a judge of this court. The judge has also sat on the New Hampshire Supreme Court pursuant to RSA 490:3 II.

The media is replete with articles about high malpractice costs causing a crisis in our courts. There is another side of the coin which receives very little media attention. The difficulty of a plaintiff like Mrs. Wilder (who nearly died as a result of this operation) in proving a case of alleged malpractice. An almost insurmountable obstacle is now placed in her path in that after clearing the hurdle as to the burden of proof (no easy task) she must now fend off evidence negating her claim in the unchartered abyss of possibilities.

For the foregoing reasons the court recuses himself in this case.

December 31, 1992

Martin F. Loughlin
Senior Judge

John Kalled, Esq.
Robert Larsen, Esq.